

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

JUAN HERMOSILLO,

Plaintiff,

VS.

MRS. HUDSON, *et al*,

Defendants.

§  
§  
§  
§  
§  
§  
§

CIVIL ACTION NO. C-11-306

**ORDER ADOPTING  
MEMORANDUM AND RECOMMENDATION ON  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Pending before the Court is Defendants' Motion for Summary Judgment (D.E. 30). On August 20, 2012, United States Magistrate Judge B. Janice Ellington issued a Memorandum and Recommendation (D.E. 39), recommending that Defendants' Motion for Summary Judgment be granted and that Defendants' counterclaim for attorney's fees and costs be dismissed. Plaintiff timely filed his Objections (D.E. 40) on August 30, 2012 raising three issues.

First, Plaintiff asserts a due process right to a *Spears* Hearing or a chance to amend to make a more definite statement of his claims. *See Spears v. McCotter*, 766 F.2d 179 (5<sup>th</sup> Cir. 1985); *Eason v. Holt*, 73 F.3d 600, 602 (5<sup>th</sup> Cir. 1996). A *Spears* Hearing and an opportunity to amend do not apply in a summary judgment posture. Those tools are only useful if claims are being dismissed as frivolous under 28 U.S.C. § 1915A or as nonexistent or incomprehensible under Fed. R. Civ. P. 12(b)(6). Through summary judgment procedure using Fed. R. Civ. P. 56, Plaintiff had sufficient opportunity to

explain his theories and present his evidence. Plaintiff's first objection is **OVERRULED**.

Second, Plaintiff objects because he did not consent to the Magistrate Judge hearing his case. Consent is not necessary under 28 U.S.C. § 636(b). The Plaintiff's right to District Court review is preserved by the process by which a memorandum and recommendation is issued, with the Plaintiff being given an opportunity to object, and this Court conducting its review of the matter. Plaintiff's second objection is **OVERRULED**.

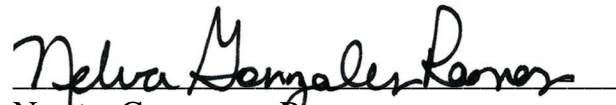
Third, Plaintiff claims that he has raised disputed issues of material fact to preclude summary judgment. The facts are not in dispute. The actions of each of the Defendants are documented in the medical records and there is no complaint that the records are not accurate. What is disputed is whether the facts demonstrate deliberate indifference. Defendants' expert evidence demonstrates that the medical attention provided was within the standard of care. The jailers' work assignment was consistent with the medical restrictions. The fact that Plaintiff, who has no medical qualifications under Fed. R. Evid. 702, disagrees is insufficient to raise a disputed issue of material fact. Plaintiff's third objection is **OVERRULED**.

Having reviewed the findings of fact, conclusions of law, and recommendations set forth in the Magistrate Judge's Memorandum and Recommendation, as well as Plaintiff's Objections, and all other relevant documents in the record, and having made a *de novo* disposition of the portions of the Magistrate Judge's Memorandum and Recommendation to which objections were specifically directed, the Court **OVERRULES** Plaintiff's Objections and **ADOPTS** as its own the findings and

2 / 3

conclusions of the Magistrate Judge. Accordingly, Defendants' Motion for Summary Judgment (D.E. 30) is **GRANTED** and this action is **DISMISSED WITH PREJUDICE**. Defendants' counterclaim for attorney's fees and costs is **DISMISSED**.

ORDERED this 13th day of September, 2012.

  
NELVA GONZALES RAMOS  
UNITED STATES DISTRICT JUDGE